

1 **OPENING STATEMENT ON BEHALF OF THE THIRD-PARTY DEFENDANTS**

2 **FULVIO FABIANI, ET AL.**

3 **MR. NUNEZ:** May it please the Court, ladies and
4 gentlemen, you have heard -- you have been hearing today from
5 the Plaintiffs' side and the Defendants' side that this is a
6 dispute that involves many millions of dollars, right? They
7 are talking about 89 million dollars. The Plaintiffs -- the
8 Defendants want over 11 million dollars.

9 Because Mr. Fabiani worked for Dr. Rossi, he has been
10 dragged in this case. That is why my client is here. And why
11 I am here -- my name is Rudy Nunez, again, I introduced myself
12 earlier -- I'm here to defend Mr. Fabiani and his company.

13 Now, you heard the Judge's instructions earlier that
14 your decision at the end of this case, you will be essentially
15 the judges of the facts, what are the facts, and what does the
16 evidence show? And your decision is going to be based on the
17 exhibits that you're shown, your decision is going to be based
18 on the testimony, and there is going to be testimony that was
19 taken under oath that's also going to be presented to you.

20 Now, based on this evidence, I will ask you at the end
21 of the case and I'll ask you at every opportunity I get, that
22 you will find Mr. Fabiani and his company are not liable for
23 the claims. There are two claims that Industrial Heat has
24 brought against him. He is not seeking any affirmative relief.
25 We're not -- Mr. Fabiani is not here trying to get paid for

1 anything. Okay?

2 You will hear that Mr. Fabiani does have a dispute
3 with Industrial Heat that he did not get paid his last payment,
4 and I will get to that in a little while.

5 Now, I want to go through what I think the evidence
6 that you will be presented in this trial -- I know you have
7 been here a long time, especially you all have been here since
8 very early, and I will do my best to get through this and not,
9 ah, and not bore you too much.

10 Now, I want to go through the evidence as to Mr.
11 Fabiani. I'm not going to talk too much about the things that
12 you've heard already. And I want to point out and it's very
13 important that when it comes to the claims against Mr. Fabiani,
14 that you focus on the evidence with regard to him, all right,
15 and not attribute to him things that others have done or said,
16 the things that you have seen today, the exhibits that have
17 been presented to you during these opening statements. All
18 right?

19 So first of all, what's Mr. Fabiani's role? You
20 didn't hear very much about him from anyone. You heard
21 Mr. Pace mention him and with regard to the data and Mr. Pace's
22 claim that there's some fake data or some false data. All
23 right. Well, let's start, Mr. Fabiani and Mr. Rossi start
24 working -- or better yet, Mr. Fabiani starts for Mr. Rossi in
25 the middle of 2012, and he starts working with regard to this

1 E-Cat technology and the E-Cat plant. Mr. Fabiani's
2 experience, he is experienced in electronics, computer science,
3 and in producing computer control boards. Okay?

4 So at around the same time that Mr. Fabiani and Dr. --
5 starts working for Dr. Rossi, that's when Dr. Rossi and
6 Mr. Darden when they start and they meet and they start
7 negotiating this license agreement that you're going to see a
8 lot about. You saw some of that today. Well, Mr. Fabiani is
9 not a party of that agreement. Mr. Fabiani had no part in
10 negotiating or bringing about that license agreement. And,
11 most importantly, Mr. Fabiani has nothing to gain whether
12 Industrial Heat has to pay Dr. Rossi in accordance with that
13 license agreement.

14 Now, you heard there was -- you heard earlier, you'll
15 hear the testimony that the E-Cat plant came to the Industrial
16 Heat's facilities sometime in August 2013. Right after that,
17 my client Mr. Fabiani enters into an agreement with Industrial
18 Heat. And it is an agreement titled Technical Consulting
19 Agreement. And that's -- that's a copy of it. It was attached
20 to pleadings, the papers that are filed by the Defendant in
21 this case. All right?

22 Now, let's take a look at this for a minute, and we'll
23 see, I have highlighted some -- some areas. Let's look at that
24 Paragraph 2. Now Mr. Fabiani -- and it's known that he has, as
25 it says here, great technical and scientific competence in

1 electronics, electromechanics, and computer science. And he
2 has experience in producing and assembling components of these
3 energy plants. By these energy plants, it's the E-Cat plant.
4 Okay?

5 Now, the consulting agreement, then it goes on to
6 say -- I'm sorry -- just the second sentence, that Industrial
7 Heat desires to engage United States Quantum Leap, which is
8 Mr. Fabiani's company, to provide services to -- and this is
9 important, because you heard Mr. Pace saying, What does the
10 contract say? It's to manufacture and develop the mentioned --
11 the above-mentioned energy plants. All right?

12 In the next page on paragraph 2, now it mentions that
13 the company, Mr. Fabiani's company, is going to provide
14 technical consulting and assistance to, again, manufacture and
15 develop the electrical equipment and the electrical system for
16 the above plants. All right?

17 Now, this agreement, this technical consulting
18 agreement, this was for a one-year period, this was for a
19 one-year term, right, that then was subsequently extended for
20 two more terms. And those extensions of the agreement, they
21 never changed the duties or responsibilities or what
22 Mr. Fabiani was supposed to do under his contracts. Right?
23 The language stayed the same. They just changed the dates.
24 All right?

25 Now, in this case one of the claims, Industrial Heat

1 claims that Mr. Fabiani breached the agreement. He breached
2 the agreement. All right? Now, you are going to be asked to
3 decide whether or not he did. And to decide that, you are
4 going to have to determine whether he breached a material term
5 of that contract. And to determine that, you will consider --
6 one of the things that you'll be instructed, you're going to
7 consider is what is the purpose and intent of the contract?

8 Now, you are going to hear testimony from Mr. Darden,
9 right, the president, he is the top guy for Industrial Heat.
10 And his understanding of that technical consulting agreement
11 was to support and help Dr. Rossi build the plant and continue
12 developing the technology. All right? To essentially help
13 build the device. Mr. Darden is expected to testify that
14 Dr. Rossi asked him, I want Mr. Fabiani to help me because of
15 the area of expertise that he has. And Industrial Heat decided
16 you know what? We want Dr. Rossi to work on this and create
17 this and be successful. So you know what? We'll enter into
18 this contract, we'll pay Mr. Fabiani, right? But to work for
19 Mr. Rossi and at Mr. Rossi's direction.

20 You are going to hear very similar testimony from
21 Mr. Vaughn, and he testifies or has testified as a corporate
22 representative for Industrial Heat. Again, his testimony is
23 going to be that the contract between Mr. Fabiani and
24 Industrial Heat was for him to help Dr. Rossi and to work at
25 the direction and discretion of Dr. Rossi.

1 You also hear -- you've heard his name at some time
2 today, a gentleman by the name of Barry West. Barry West was
3 an independent -- is an independent contractor for Industrial
4 Heat. He is going to be a witness for Industrial Heat. And
5 Mr. West is going to testify that he worked essentially for
6 three years, the entire time Mr. Fabiani had contracts, these
7 consulting agreements, with Industrial Heat, that almost the
8 whole time he worked along beside Mr. West. Mr. West also
9 confirmed that Mr. Fabiani's role was in electrical design and
10 maintenance of the plants. All right. Mr. West is going to
11 testify that they knew Mr. Fabiani worked previously for
12 Dr. Rossi, they knew they had this previous relationship, and
13 that they didn't have a problem with that. They accepted that,
14 because what they wanted, when they entered into this agreement
15 with my client, was just anything Mr. Rossi needed to help the
16 plant work, so they brought on Mr. Fabiani to do that.

17 Now, there is a provision in the contract -- and
18 you're going to hear about this later on from the other side,
19 and this has to do with the data and turning over data by
20 Mr. Fabiani to Industrial Heat. And there is a provision,
21 paragraph 6, that talks about all confidential information
22 belongs to Industrial Heat. And if you are not able to see
23 that, maybe I can zoom in just a little. And it references
24 tester results. Okay?

25 With regard to this provision, you are going to hear

1 testimony from Mr. Darden. Strike that. You are going to hear
2 testimony from Mr. Vaughn, all right, and that Mr. Fabiani was
3 not the, let's say, data -- I think his -- the way he explained
4 it was not the data-capturing expert for Industrial Heat.
5 That's not his job, Mr. Fabiani's job, to collect this data.

6 Today, here in this trial, it is a big issue of the
7 data, what data was provided, what data wasn't provided. All
8 right? But when they entered this agreement and Mr. Fabiani
9 started working for them and it was up in North Carolina,
10 collecting data wasn't his job back then. All right?

11 Now, Mr. Darden and Mr. Vaughn will also confirm and
12 the evidence will show that my client did turn over data. He
13 was asked by Mr. Rossi at certain times to collect data to show
14 and for his own knowledge to see how the plants were working
15 how the technology was working. And they'll testify that that
16 data was turned over to Industrial Heat. Okay? Even when the
17 plan was in Florida, my client was turning over data to
18 Industrial Heat.

19 Now, there is going to be testimony, you are going to
20 hear how at the end of this test, however they want to call
21 it -- again, it's not our dispute -- whether the test in Doral
22 counted for purposes of the license agreement, for the
23 amendments license agreement. That's not my case to prove or
24 disprove. All right?

25 But what the evidence is going to show that it's at

1 that time, at the end of the test essentially when everything
2 is going to blow up between the two parties, then they started
3 saying, oh, where is this data, and we want this data, now they
4 are claim that he didn't give them the data.

5 Well, that's going to be contradicted by a few things.
6 Okay? First of all, you will hear from my client, he'll come
7 in, hopefully -- and I think I told you earlier, he doesn't
8 live in this country, he's travelling, he will be here next
9 week, and I expect him testify in the trial. He's going to say
10 that, again, while the plant was in Doral, he was turning over
11 power consumption data to Industrial Heat.

12 Now, after everything blows up and these guys are
13 fighting against each other, all right, my client is summoned
14 by Industrial Heat to come to the offices of their attorneys.
15 All right? So Mr. Fabiani's called and says you have go down
16 to the offices of Mr. Pace. All right? Now, his understanding
17 is that, one, they are going to make him an offer to extend his
18 contract for another three years, and they are going to make
19 the payment that is due to him under the existing contract that
20 he had.

21 Now, my client goes to the offices of Industrial
22 Heat's attorneys -- this is before the litigation starts -- and
23 he turns over data. He goes on two occasions. He turns over
24 data. And that promised contract -- or at least in his mind,
25 he was going to get this extension of his contract -- no

1 extension of the contract and no payment either. There was --
2 the last payment under the contract was never made.

3 So at that point, the testimony will show, my client
4 did not turn over certain raw data to them. It has been turned
5 over subsequently. Okay?

6 Now, the last thing on this -- on issue of data -- and
7 I think this is very important for you to keep in mind
8 throughout this trial -- you are going to be presented with
9 expert reports. All right? And those expert reports from
10 Industrial Heat's experts, they utilize and they rely on the
11 data that Mr. Fabiani did give them. Not just the raw data at
12 the end, but the data that he was giving them during the test
13 at Doral, the data that he turned over to them at their
14 attorney's office, okay, their own experts rely on that data.
15 At the same time, they make a claim that Mr. Fabiani didn't
16 turn over data. Okay?

17 Now, let me move -- so there is the claim on the
18 breach of contract. Okay?

19 THE COURT: Five minutes.

20 MR. NUNEZ: Thank you, Your Honor.

21 There is a claim on the breach of contract. There is
22 also the claim of this deceptive scheme. This alleged
23 deceptive scheme, all right? You didn't hear anything today
24 that my client had anything to do with JM Products. My
25 client -- you would have heard it. There is nothing in writing

1 that he said anything about JM Products. There is nothing
2 tying him to JM Products. Okay?

3 There is nothing -- you didn't hear today anything
4 said by Mr. Pace that my client did anything or said anything
5 about moving the plant to Florida. My client, you know why?
6 Because there is no evidence to that. All right?

7 You are going to hear evidence -- Mr. Vaughn, he was
8 questioned in his deposition, and he couldn't come up with a
9 single factor to show my client, again, had anything to do with
10 JM Products or moving the plant down to Florida.

11 There's another issue that they brought up that they
12 weren't allowed into the JM Product's side of the building.
13 Well, in that, you are going to hear from Mr. West, the
14 contractor and witness for Industrial Heat, and he is going to
15 testify to this, and he's going to -- his testimony is going to
16 be that my client didn't have free access to JM Products. His
17 access was restricted. He was restricted to where the
18 containers were. He wasn't allowed to freely to cross over.
19 Yes, there's testimony from Mr. West that he would go to the
20 front offices of JM Products, if they had computer issues.
21 Okay. But he still had to go around. And the only Mr. West
22 ever saw him go through those doors that you saw on that
23 picture, it was one time, and he was allowed in by an employee
24 of JM Products.

25 Now, the last part is this manipulation of data. Now,

1 you saw a graph today that Mr. Pace showed you, and it talked
2 about the FP&L numbers and that my client and his energy
3 consumption numbers had shown that there was -- what was it?
4 That there was more energy than that was reported by FP&L.
5 Their own witness, their expert witness Joe Murray who created
6 that graph, his testimony is that that occurred on 14 days of
7 the 350-plus days of the test. That occurred on 14 days.
8 That's why my client is in here is for those 14 days. But you
9 are going to hear testimony from Mr. Murray, their expert, that
10 he couldn't attribute that to either Mr. Fabiani, to the
11 equipment that was measuring the input, the power input, or it
12 could have even been a problem with FP&L's numbers.

13 That's why my client is here. And, again, my time is
14 running out. I am almost out of time. That I will ask you
15 that at the end of this, that you find that Mr. Fabiani's not
16 liable.

17 And the last thing I will leave with you -- and I
18 think it's very important is Mr. West, again, a person who was
19 a contractor for Industrial Heat, worked with Mr. Fabiani for
20 almost three years side by side working on this technology, and
21 he was asked whether he saw Mr. Fabiani do anything deceitful
22 or dishonest to Industrial Heat, and his answer was simply no.

23 So I ask you to find my client is not liable for these
24 two claims brought against him. Thank you.

25 THE COURT: Ladies and gentlemen, I know you have all